

# IN SEARCH FOR A DEMOCRATIC CONSTITUTION: INDONESIAN CONSTITUTIONAL REFORM 1999 - 2002

DENNY INDRAYANA

Fakultas Hukum Universitas Gadjah Mada, Yogyakarta.

## ABSTRACT:

In 1999, the Indonesian People's Consultative Assembly enacted the First Amendment to the 1945 Constitution. Over each of the next three years, it passed a further amendment. This paper argues that the amendments lacked what have widely been accepted as key features of a democratic constitution-making process. Many of the problems related to fundamental issues within the Constitution itself. It contained two aspects seen as crucial to the identity and survival of the country by most nationalists: the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the Pancasila. This paper proposes that to resolve the difficult relationship between Islam and the state - for the immediate future at least - the preamble and Article 29 should be made as a non-amendable and 'entrenched'. From Indonesia's experience, beside observing the general characteristics of constitution-making process in transition, scholars should note how the symbolic value of the 1945 Constitution strongly overshadowed the way the constitutional reform took place.

Keywords: Constitution, Democracy, Amendment, Reform, Indonesia.



## I. INTRODUCTION

Indonesia declared its independence on 17 August 1945. The following day, a 1945 Constitution was adopted as Indonesia's first Constitution. Over the next sixty two years Indonesia adopted four different constitutions: the 1945 Constitution, the 1949 Federal Constitution, the 1950 Provisional Constitution and the 2002 Constitution. I name the current Constitution as the 2002 Constitution because it is actually a new Constitution and not only amendments to the 1945 Constitution, as it is formally argued. The last one is Indonesia's current Constitution after four amendments to the 1945 Constitution which took effect in 1999, 2000, 2001 and 2002. The four amendments are constitutional reforms made after the downfall of Soeharto's authoritarian regime in 1998. The amendments are very significant because the People Consultative Assembly effectively rewrote the Constitution. However, none of the political factions in the Assembly admit that they have made a new Constitu-

tion. Therefore, formally, the Constitution after the four amendments is still named the '1945 Constitution'.

This passage elaborates on the reform of the 1945 Indonesian Constitution. It describes how the four amendments is Indonesia's way to reform the constitution from an authoritarian text into a more democratic one. The 1999 – 2002 constitutional reform is not an easy one, off course. One of the reason is because the development of Indonesian Constitution in the last 65 years, from 1945 – 2010, has been strongly influenced by debates on the relationship between the state and Islam. The last constitutional amendments of 1999 – 2002 are highly coloured by the same debates. The debates relate to fundamental issues within the Constitution itself. It contained two aspects seen as crucial to the identity and survival of the country by most nationalists, including the military: the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble to the Constitution.

Therefore, Chapter XI, Article 29 of the 1945 Constitution, on Religion, was the only chapter which was not altered by the 1999-2002 constitutional reforms. The rejection of the proposal to insert the 'seven words' of the Jakarta Charter into Article 29(1) was more evidence that the debates on nationalism and Islamic state are sensitive and crucial issues in Indonesian constitutional history. The 1999-2002 constitutional debates on the insertion of the Jakarta Charter, in fact, repeated the same debates which had taken place in 1945 and 1956-1959.

The possibility that both the preamble (*Pancasila*) and Article 29 should be entrenched in their current forms to try to resolve the difficult relationship between Islam and state should therefore be given careful consideration. This would mean that the preamble and Article 29 should explicitly be identified as non-amendable provisions. This kind of provision is legitimate from a constitutional law perspective.

Finally, despite the chaotic amendment process, Indonesia has effectively produced a new Constitution. Evolutionary step-by-step amendment has at last ended the temporary character of Indonesia's previous constitutions. Further, the amendments established a clearer separation of powers between the executive, legislature and judiciary; and far more impressive human rights protections. The paper will further discuss how Indonesia finally succeeds in searching its more democratic constitution.

## II. EXPLANATION

### A. CONSTITUTION MAKING AND AMENDMENTS

This section describes the constitution-making process and amendments in the period 1999-2002. As mentioned above, the People Consultative Assembly adopted four amendments to the 1945 Constitution. Before these amendments the 1945 Constitution had been in force in two different periods, first from 1945 to 1949, and again from 1959 to 1998.

Since 1999, the 1945 Constitution has been amended four times. I refer to the amended document as the "2002 Constitution", although formally it is still called the "1945 Constitution".

Officially, the People Consultative Assembly started the amendment process in 1999 and ended it in 2002. However, the embryo of the amendments was developed in the earlier period between Soeharto's forced resignation in May 1998 and the passing of the First Amendment in 1999 (Bonime-Blanc,;Boulder and London, 1987: 139), that is, during Habibie's presidency. During this period, Habibie's administration set up popular initiatives such as better protection for human rights, release of political prisoners and reform of electoral laws. These initiatives created an environment conducive to the introduction of amendments to insert greater protection of rights into the Constitution. Habibie's initiative in bringing forward the election from 2002 to 1999 was another important pre-amendment decision. The 1999 General Election was crucial as part of the preliminary requirement to build a legitimate People Consultative Assembly that could then amend the 1945 Constitution.

#### 1. How the Constitution-Making was Conducted

Indonesia had no clear direction as to what the amendments should seek to achieve. The only direction which guided the People Consultative Assembly was the obvious need to change the Constitution. The five principles that the Assembly members all agreed on were:

- a. to preserve the preamble of the Constitution;
- b. to maintain the unitary state of the Republic of Indonesia;
- c. to keep the presidential system government;
- d. to insert the normative provisions then in the elucidation, into the body text of the Constitution; and
- e. to process the amendments through the form of 'addenda', without deleting the original text of the 1945 Constitution.

These five agreements meant, however, that making a totally new Constitution was impossible. Yet, in reality, the agreement to merely amend the Constitution was not consistent. Table 1 shows the structure of the Constitution before and after the four amendments. It demonstrates that most provisions of the 1945 Constitution were either amended or deleted. Therefore, the amendments were effectively a total revision of the 2002 Constitution (*see Tabel 1*).

Table 1 demonstrates that 95% of the chapters, 89% of the Articles and 85% of the paragraphs are either new or were alterations of the originals. Chapter XI on Religion is the only one which has not been changed. This again shows that the relationship between Islam and the state was one of the most sensitive issues dealt with during the amendment process.

TABLE 1 THE 1945 CONSTITUTION: BEFORE AND AFTER THE AMENDMENTS

	Before Amendment	After Amendment					
		Unchanged	Deleted	Amended	Added	Total	% Unchanged
Chapters	16	1	1	14	5	20	1/20= 5%
Articles	37	8	1	28	37	73	8/73= 11%
Paragraphs	65	29	2	34	131	194	29/194= 15%

This paper argues therefore that the four amendments were a step-by-step process to write a new Constitution, but without reopening the question of the national symbolism of the original 1945 Constitution: the rejection of Islamic state and the nationalist state ideology, the *Pancasila*. The principles, which are deliberately highly abstract, are Belief in One God, a Just and Civilized Humanity, the Unity of Indonesia, Democracy Guided by Inner Wisdom in Unanimity Arising out of Deliberation among Representatives and Social Justice for All the People of Indonesia. It was an evolutionary constitutional renewal. In fact, although it has been changed and modified significantly, the official name of the renewed document remains the '1945 Constitution'.

Asshidique criticized the amendment process for the absence of an academic draft to guide the process. For him, the paradigm was only found much later, when the People Consultative Assembly became involved in the serious amendment discussions. Lubis agrees that the process was conducted without a clear paradigm "without any clear concept, being ad hoc and partial in nature" (*Kompas*, 2 July 2002). Jakob Tobing, the Chairperson of the Drafting Committee of the People Consultative Assembly, admitted that the agenda setting for the amendment appeared to have been:

... by coincidence. Each member of the Drafting Committee of the People Consultative Assembly had different goals. But after three years of intense negotiation and working together ... we had finally achieved the common goals that we had been fighting for together (Report, Singapore.. <<http://www.vanzorgereport.com/report/popup/index.cfm>).

## 2. Who the Constitution-Making Body was to be

The question of 'who the constitution-making body should be' overshadowed the four amendment processes. The role of the People Consultative Assembly was constantly challenged by the possibility of establishing a Constitutional Commission. In the end, the Assembly could not resist the pressure from the public to establish a Commission. The Commission established in 2003 after the four amendments were completed was, how-

ever, given only limited authority to 'review' the four amendments and submit its findings to the People Consultative Assembly.

Although the People Consultative Assembly finally issued a Decree to establish a Constitutional Commission at the end of the 2002 Assembly's Annual Session, this Commission was far from what was expected. The mandate of the Constitutional Commission was also very weak. It was subordinate not only to the People Consultative Assembly but also to the Working Body of the People Consultative Assembly (Report, Singapore, <<http://www.vanzorgereport.com/report/popup/index.cfm?>>).

This means that the Commission would merely be a powerless assistant to the People Consultative Assembly. In this form, the Commission would have no power to design the structure of any new amendment (*The Jakarta Post*, 15 July 2003). With such an inferior position, it was not difficult for the People Consultative Assembly to reject the Commission's report, which thus became a useless document. Up to the writing of this paper, the People Consultative Assembly has never seriously considered the report submitted by the Constitutional Commission.

In spite of the strong criticism of the People Consultative Assembly, no one can deny its achievement in ratifying the four amendments. Few predicted that the Assembly, a body with "a justified reputation for party political in-fighting and horse trading" (Tim Lindsey, 2002: 244). Would ever succeed in achieving a majority decision to approve the amendment drafts. One of the reasons behind the success was its willingness to reduce its own power. For Ellis, the People Consultative Assembly has made an exceptional international precedent by agreeing to abandon its previously all-powerful status (Ellis, 2003: no page). The original Article 1(2) of the 1945 Constitution stated that the Assembly was the sole representative of the sovereignty of the people. This monopoly on sovereignty had become the legal basis for the People Consultative Assembly to be a supreme parliament. Extraordinarily, this power was relinquished by the Assembly by the Third Amendment of Article 1(2), which now stipulates that, "Sovereignty is in the hands of the people and is exercised in accordance with Constitution".

### 3. Public Participation: Limited and Badly Organized

Public participation in the four amendments can be divided into two categories: the participation arranged by the People Consultative Assembly and that of the civil society (media and non-governmental organizations). The Assembly failed to conduct comprehensive public participation and the participation it allowed was often partial and ad hoc. Fortunately, however, the civil society covered this shortcoming through active advocacy.

In the First Amendment, public participation arranged by the People Consultative Assembly was almost non-existent. The time limitation placed on the First Amendment discussions meant that participation could not be organized properly. During the Second

Amendment discussions, the People Consultative Assembly was allowed a longer time for amending the Constitution and some of the time was used to involve the public in the amendment process and seminars and hearings were conducted. The members of the People Consultative Assembly's Drafting Committee of 2000 visited 21 countries as part of a program called "international comparative studies". These studies, however, were more of a 'picnic' as there was no obligation for the members to make a comprehensive report after they had completed the visit (Minutes of the 12<sup>th</sup> meeting of the Drafting Committee of the People Consultative Assembly, 11 February 2000).

During the Third Amendment discussions, the People Consultative Assembly, responding to criticism from the civil society, formed an 'Expert Team' to help the amendment process. Most of this team's recommendations were not adopted by the People Consultative Assembly. Lastly, during the Fourth Amendment discussions, public participation programs worked better than in the case of the previous amendments. It was only during this last amendment debate that the public had a better opportunity to comment on the amendment proposals (Minutes of the 3<sup>rd</sup> meeting of the Working Body, 4 June 2002: 175). However, the way the Assembly arranged the participation program did not leave the public sufficient time to discuss the amendment drafts. The People Consultative Assembly's seminars were mostly held in big hotels in metropolitan cities and people in rural areas, where most Indonesians live had no opportunity to join the seminars.

#### 4. An Unavoidably Messy Process

This section argues that one of the main reasons for the messy amendment process was because of fundamental perceptions of certain key aspects of the 1945 Constitution itself. Although this Constitution was widely and passionately criticized as undemocratic text, it was, and still is, seen by nationalist factions – including the military – as an important document, which contains two crucial aspects for the survival of the country. These are the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble to the Constitution. Agreement to keep the preamble was, therefore, at the heart of all of the constitutional amendments. As the leader of the nationalist camp, President Megawati was particularly keen to retain the preamble in its present form ("Constitutional Change: The Charter Again", [Error! Hyperlink reference not valid.](#)). She argued strongly that:

[t]he position to keep the preamble is non-negotiable. This preamble does not merely consist of words; it mirrors the national spirit, soul and feelings of the founders and the freedom fighters (*Kompas*, 13 July 2002).

The preamble was thus more than just a symbolic text: it was a fundamental principle. Without the agreement to keep it, amendment would have been difficult if not perhaps impossible. Members of the People Consultative Assembly, especially from the

nationalist faction, rejected the possibility of changing the preamble, saying it embraced what they believed to be the sacrosanct principles of the country: the *Pancasila* state ideology and the unitary state of the Republic of Indonesia (*The Jakarta Post*, 6 August 2002). For them, the preamble should never be changed as it acknowledges the presence and urges the peaceful existence of diverse ethnic groups, cultures and religions in this country (*The Jakarta Post*, 31 December 2001).

The debate on maintaining the preamble again revealed two fundamental but different ideological groups in Indonesian politics: the nationalists and Islamic groups (*Constitutional Change: The Charter Again*: 41). The conflict between the two political streams, especially on the issue of the state and Islam, had been evident in the constitution-making process in 1945 and in the *Konstituante* of 1956-1959. Therefore, in the 1999-2002 amendment process, the nationalist faction was again afraid that the Islamic parties would use the momentum of constitutional reform to establish a preliminary constitutional basis for an Islamic state. This fear influenced almost all of the decision-making during the four amendment processes, including the decision to amend and not make a new Constitution, although in reality this amendment decision was inconsistent.

After the four amendments, the basic conditions are in place to make the constitutional system work. The *Jakarta Post* has stated that whatever shortcomings one finds in the four amendments, "they still stand a better chance than the original text in sparing Indonesia from being plunged back into darkness once again" (*The Jakarta Post*, 1 August 2002). In commenting on the process and the outcome, Lindsey argues that:

... despite all the difficulties, progress is being made: the 1945 Constitution after the Fourth Amendment has many shortcomings but it is an incomparably better document ... historically few countries have ever managed to adopt constitutional reforms as effective as Indonesia's purely through parliamentary debate (Lindsey, 2002 : 260).

## B. CONSTITUTIONAL REFORM 1999 – 2002

This section considers parliament, the legislation process, and system of government pursuant to the four amendments. The 2002 Constitution is clearly a more democratic text than it was before the amendments. This section also compares the relevant constitutional provisions before and after the amendments and criticizes some shortcomings of the outcomes to show that further reform is still needed.

### 1. Legislative Reform

The four amendments have changed the structure of the parliament. The People Consultative Assembly, which had previously consisted of the DPR (House of Representatives) and additional functional groups – including the military –, has changed to include the members of the DPR and the DPD (the Regional Representative Council) (Article 2(1)

of the Fourth Amendment). The members of the DPR represent political parties' interests, while the members of the DPD represent regional interests (Article 22C (1) *juncto* 22E (3) and (4) of the 1945 Constitution). Importantly, all members of the two chambers are now elected by the people. This has meant the end of the system of "free" seats for the military and other functional groups.

A monumental change occurred when the Third Amendment stipulated that the 'sovereignty is in the hands of the people and is exercised in accordance with the Constitution' (Article 2(1) of the Third Amendment). This had the effect that the People Consultative Assembly is no longer the sole holder of sovereignty, is no longer the highest institution in the Republic and no longer holds unlimited powers. The sovereignty amendment was followed by other functional reform of the People Consultative Assembly. Table 2 shows the Assembly's power before and after the amendments. It demonstrates that the People Consultative Assembly now has more limited powers than it did before the amendments. This highlights the fact that the People Consultative Assembly, as the constitution-making body, has been able to reform and limit its own powers.

TABLE 2 THE PEOPLE CONSULTATIVE ASSEMBLY: BEFORE AND AFTER THE AMENDMENTS

PROVISIONS	BEFORE THE AMENDMENTS	AFTER THE AMENDMENTS
People's Sovereignty	Monopolized by the People Consultative Assembly.	The People Consultative Assembly does not monopolize the sovereignty. Sovereignty shall be implemented in accordance with the Constitution.
Position	The highest state institution, with unlimited powers.	The People Consultative Assembly is one of several institutions with limited powers.
Presidential Election	Elected by the People Consultative Assembly.	The People Consultative Assembly inaugurates the President and Vice President, who are directly elected by the people.
The Broad Guidelines of State Policy (GBHN)	Prepared by the People Consultative Assembly, the President should implement and account for implementation to the People Consultative Assembly.	The People Consultative Assembly does not have this authority.
Constitutional amendment	Amended and determined by the People Consultative Assembly.	The People Consultative Assembly still has these authorities. (although the amendment procedures have been changed).
Presidential Impeachment	Removed by the People Consultative Assembly. The procedure was not explicitly stipulated in the Constitution.	The People Consultative Assembly has the power to remove the President. This power is explicitly stipulated in detail in the Constitution.
Vacant Presidency	The Constitution was silent on this.	The People Consultative Assembly has the power to elect the President and/or Vice President, in the case that one or both of the positions become vacant.



Since the amendments, the DPR has become a very powerful legislative body. Isra argues that the amendments have, in fact, resulted in a 'supreme' DPR, and the Constitution has thus shifted from being an executive-heavy Constitution to a DPR-heavy Constitution (Isra, 2004: 128). Asshiddiqie points out the DPR's involvement in the acceptance of foreign ambassadors (Article 13 (3) of the First Amendment) as an example of how much more powerful the DPR has become since the amendments. He argues that this Article is not practical and breaches the international customs of diplomacy (Asshiddiqie, 2001: 22). Table 3 shows how the DPR has shifted from a 'rubber stamp' to a 'supreme' organ of state.

TABLE 3 THE DPR: BEFORE AND AFTER THE AMENDMENTS

NO.	BEFORE	AFTER
1.	The Constitution did not clearly stipulate that the DPR had legislative, budgetary and supervisory functions.	Clearly stipulated.
2.	The Constitution did not stipulate that the DPR had the right of interpellation, the right to carry out inquiries and the right to express its opinion.	Stipulated.
3.	The Constitution did not stipulate that each of the members of the DPR had the right to submit questions, to convey suggestions and opinions, and a right of immunity.	Stipulated.
4.	The Constitution stipulated that the DPR's agreement was required to declare war, make peace and conclude treaties; and to promulgate a government regulation in lieu of law to become a statute.	Has similar powers.
5.	The Constitution did not stipulate that the DPR's agreement was required: to make an international agreement; to approve and confirm the candidate judges of the Supreme Court; to appoint and remove the members of the Judicial Commission.	Stipulated.
6.	The Constitution did not stipulate that the DPR selected the members of the state Audit Board, and three judges of the Constitutional Court.	Stipulated.
7.	The Constitution did not stipulate that the DPR selected the members of the state Audit Board, and three judges of the Constitutional Court.	Stipulated.
8.	The Constitution stipulated that the DPR received the report from the state Audit Board.	Has similar powers.
9.	The Constitution did not clearly stipulate the DPR's role in an impeachment process.	Clearly stipulated.
10.	The elucidation of the Constitution stipulated that the President could not dissolve the DPR.	Clearly stipulated in the body of the Constitution.

Another monumental achievement of the amendment process occurred when the First Amendment withdrew the power to make statutes from the President, and gave the power to the DPR. Manan argues that this amendment established clearer checks and balances between the President, as the executive body, and the DPR as the legislative body (Manan, 2003: 20-22). It also addressed the previous unsatisfactory situation, whereby the President had the stronger authority to make statutes. This concept had resulted in wide-spread abuse of powers under Soeharto's authoritarian regime (Manan, 2003: 21). Nevertheless, the legislative role of the DPR remains vulnerable. All the Bills must be approved by both the President and the DPR through discussion to become law (Article 20 (2) (3) of the First Amendment), and the President retains an absolute veto power to reject any Bills at this discussion stage (Falaakh, Paper presented at National Seminar on Meluruskan Jalan Reformasi, <http://ugm.ac.id/seminar/reformasi/i-fajrullfalkh.php>), although as explained later, once the President agrees he or she cannot later veto by refusing to sign a Bill. Within 30 days it will become law regardless of such a refusal (Article 20(5)).

A further legislative reform was the establishment of a regional 'senate' (DPD). This new institution was intended to give regional communities a more active role in governance, in line with the concept of regional autonomy (Manan, 2002: 53). The DPD, however, was given very limited authority, especially when compared to the DPR. This is yet another example of compromise in the amendment process.

As a result, the DPD now lacks strong legislative powers (*Kompas*, 2 September 2002). It can only submit Bills to the DPR and then participate in the discussion of Bills relating to regional autonomy, central-region relations, the formation, expansion and merger of regions, the management of natural resources and other economic resources, and the financial balance between central and the regions (Article 22D (2) of the Third Amendment). The DPD can also advise the DPR on Bills relating to the state budget, taxation, education and religion (Article 22D (2) of the Third Amendment). However, it is not involved in the ratification process of any of these Bills. This is a matter solely for the DPR and the President (Article 20 of the First Amendment). Further, the DPD has the authority to supervise the implementation of laws on these matters, but does not have the authority to take further action. This action is a matter for the DPR, to which the DPD submits the results of its supervision (Article 22D of the Third Amendment). Consequently, Manan argues that the DPD is only a complementary, rather than supplementary, chamber to the DPR (Manan, 2002: 56).

## 2. Executive Reform

Ellis argues that, before the amendments, Indonesia's so-called presidential system was not 'presidential' in the sense the term is understood in the United States and the

Philippines, because Indonesian presidents were not directly elected and could be discharged by People Consultative Assembly vote (Ellis, 2002: 119-120). Since the amendments, however, Indonesia has adopted this more 'conventional presidential system' model (Ellis, 2002: 152). Table 4 shows the Indonesian presidential system before and after the amendments.

**TABLE 4 THE PRESIDENTIAL SYSTEM: BEFORE AND AFTER THE AMENDMENTS**

<b>PROVISIONS</b>	<b>BEFORE</b>	<b>AFTER</b>
One Person or Collegiate	One Person.	One person.
Status	Chief of Executive.	The same.
Election Process	Indirect, by the People Consultative Assembly.	Directly elected by the people.
Tenure	Unlimited, could be re-elected every 5 years.	Limited for a maximum two terms of 5 years.
	Not fixed, easily removed.	Fixed, not easily removed.
Legislative Powers	More dominant than the DPR.	Shares powers with the DPR and DPD.
Appointment and removal Powers of high ranking state officials.	Not clearly stipulated. In practice, these powers are, therefore, unlimited.	Limited.
Impeachment Procedure:	Generally mentioned in the elucidation of the Constitution, and was mostly stipulated in a People Consultative Assembly Decree.	Stipulated in the Constitution.
Legal Basis		
Reasons	More political than legal: if the President 'truly breached' state policy and the Constitution.	More criminal. That is if the President is convicted of 'treason, corruption, other high crimes or misdemeanors, or proven to no longer fulfill the requirements of the office of President'.
Judicial Branch	Not involved in the process.	Involved. The Constitutional Court shall investigate, try and decide on a recommendation by the DPR that the President should be impeached.
Requirement	Easier. A simple majority vote, which rejects the accountability speech, could impeach a President.	More difficult. The process requires the decision-making in the DPR, Constitutional Court and People Consultative Assembly. Only an absolute majority vote in the DPR, a guilty decision in the Court and another absolute majority vote in the People Consultative Assembly can impeach a President.

Table 4 demonstrates that Indonesia now enjoys a better system of checks and balances on presidential powers. Although the direct presidential election strengthens the legitimacy of the President, this does not mean that the power of President will be unlimited. The President's removal and the appointment power of high-ranking state officials is

better regulated. For example, under the original 1945 Constitution, there were no provisions on how members of the People Consultative Assembly, DPR, BPK (the State Audit Agency) and Supreme Court Judges were to be elected or appointed. Consequently, President Soeharto managed to choose loyalists as members of these institutions. These "President's men" contributed to a general absence of institutional controls over the President for most of the New Order period. The amendments directly addressed these problems. Now, for example:

- a. members of the People Consultative Assembly, DPR and DPD shall be elected by the people (Article 2(1) of the Fourth Amendment).
- b. the members of BPK shall be chosen by the DPR, taking into consideration the advice of the DPD, and approved by the President 9 Article 23F (1) of the Third Amendment); and
- c. the names of candidates for appointment as a Justice of the Supreme Court shall be submitted by the Judicial Commission to the DPR and then be confirmed by the President (Article 24A (3) of the Third Amendment).

The legislative power, which was previously dominated mainly by the President, has now shifted to become a power of the DPR (Article 5(1) and 20 (1) (5) of the First Amendment), with little participation by the DPD (as mentioned). The President, however, still has a significant legislative power. Bills are discussed and must be assented to by both the DPR and President at this stage (Article 20(2) (3) of the First Amendment). This Presidential consent requirement is basically the 'veto right' for the President. This right is stronger than the veto right of the President of the United States. In Indonesia, if the President rejects a Bill there is no mechanism by which the DPR and/or the DPD can overrule such a rejection. However, if the President does give assent at this stage he or she may not later change his or her mind and refuse to sign the Bill into law. Article 20(5) provides that a Bill agreed upon by both the President and DPR will become law in 30 days, in such circumstances. To strengthen the system of checks and balances, however, the President's legislative powers should therefore be further reformed by being reduced or limited by giving the DPR and DPD an American-style right to counter veto a discussion stage refusal by the President.

### 3. Human Rights Reform

The original 1945 Constitution lacked sufficient human rights provisions (Susanti, 2001: 3). This was one of the biggest shortcomings addressed through the amendments. Kawamura, for example, argues that:

[i]f Indonesia intends to become a democratic state, establishment of constitutional guarantee of human rights and freedom as inalienable rights of human beings certainly is one of the top priority tasks (Kawamura, 2000: 2).

Indeed, after the Second Amendment of the 2002 Constitution, the human rights protections were more impressive, on paper at least. Clarke argues that the amendment on the Bill of Rights is "the first meaningful protection of human rights in Indonesia's 1945 Constitution" (Clarke, 2003: 3). Lindsey argues that the long and impressive Chapter XA on Human Rights succeeds in shifting the original 1945 Constitution from a document which guaranteed few human rights, to one which, in a formal sense at least, provides more extensive human rights protection than do many developed states (Lindsey, 2002: 36, 254).

There are, however, at least two shortcomings in the human rights provisions. The first is relatively minor, in relation to duplication of provisions: for example, both Articles 27(1) and 28D (1) stipulate equality before the law. The second, however, is a major shortcoming. It relates to Article 28I (1) (the non-retrospectivity provision), discussed earlier. The problem is not the non-retrospectivity provision itself. Despite being widely debated, the notion of a law not being applied retrospectively has been adopted in many countries and is a norm of international law, although with qualifications (Clarke, 2003: 8-14).

The problem for Indonesia is that the Second Amendment stipulates that the non-retrospectivity provision "may not be interfered with under any circumstances at all" (Article 28I (1) of the Second Amendment). This is against international norms, which are usually read by Courts as gratifying retrospectivity prohibitions. Clarke, for example, argues that, "[the] most established exception to the principle of non-retrospectivity is crimes against humanity" (Clarke, 2003: 11). This exception cannot apply in Indonesia as the Constitution now stands and this has serious implications for human rights prosecutions in relation to abuses committed, for example, under the New Order by the military.

#### 4. Judicial Reform

This section elaborates judicial reform pursuant to the four amendments. In the 2002 Constitution, there are two main judicial reforms: first, in addition to Article 1(3) of the Third Amendment, which expressly stipulates that Indonesia is a state based on Law (Article 1(3) of the Third Amendment), the Third Amendment further strengthens judicial reform by explicitly inserting the 'independence of the judiciary' principle into the Constitution (Article 24(1) of the Third Amendment). This principle had previously only been stipulated in the elucidation of the Constitution and not in the text.

Secondly, compared to the executive and legislative bodies, the structural reforms to the judiciary are more comprehensive. The Third Amendment established two new institutions: the Constitutional Court and Judicial Commission. The Court has an equal position to the Supreme Court, but with a different jurisdiction. The decision to form a new court is a better solution than giving the new judicial powers to the Supreme Court, given the acute corruption problems in the Supreme and existing lower level courts. As Lindsey

points out, concern about the integrity of existing courts was, in fact, one of the key reasons for the establishment of the new Court (Lindsey, 2002: 261). Table 5 shows the judicial branch before and after the amendments.

**TABLE 5 THE JUDICIARY: BEFORE AND AFTER THE AMENDMENTS**

	<b>BEFORE</b>	<b>AFTER</b>
<b>Independence</b>	Stipulated in the elucidation.	Stipulated in the body of the Constitution.
<b>Institutions</b>	The Supreme Court and its lower level courts.	The Supreme Court, lower level courts, Constitutional Court and Judicial Commission.
<b>Judicial review of a statute</b>	N/A	Performed by the Constitutional Court.
<b>Dispute settlement between state institutions</b>	N/A	Performed by the Constitutional Court.
<b>Political parties dissolution pro-cedure</b>	N/A	Performed by the Constitutional Court.
<b>Dispute settlement of general elections results</b>	N/A	Performed by the Constitutional Court.
<b>Involvement in the impeachment</b>	N/A	Performed by the Constitutional Court.
<b>Appointment and removal of judges</b>	Unclear - in practice was monopolized by the President.	For the judges of the Supreme Court, this is a matter for the Judicial Commission, the DPR and President. For the Constitutional Court, this is a matter for the President, DPR and Supreme Court.

One of the crucial powers newly granted is judicial review of statute, something which was unavailable prior to the Third Amendment. Indeed, within one year of its establishment in 2003, the Constitutional Court had “won a reputation for competence and independence” through its exercise of this new power (*The Australian*. 27 July 2004). In terms of rule of law, in 2001, the Third Amendment of the 1945 Constitution rules that “The Indonesian state is a state ruled by law”. Before the amendment, the same provision is only part of the elucidation of the 1945 Constitution. During the amendment process in 1999 – 2002, important provisions in the elucidation are adopted as body text of the Constitution, while the rest of the elucidation is no longer acknowledged as part of the Constitution.

Further, the Indonesian legal system is outlined in Article 24, the Judicial Power Chapter of the 2002 Constitution which rules that the judicial power is the independent

power to maintain a system of courts with the objective of upholding law and justice. The judicial power is exercised by a Supreme Court and the courts below it in the respective environments of public courts, religious courts, military courts, administrative courts and by a Constitutional Court.

Article 24C of the 2002 Constitution rules that the Constitutional Court has the authority to hear matters at the lowest and highest levels and to make final decisions in the review of legislation against the Constitution, the settlement of disputes regarding the authority of state bodies whose authority is given by the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections. The Constitutional Court has the duty to adjudicate on the opinion of the House of Representatives regarding allegations of misconduct by the President and/or the Vice President in accordance with the Constitution.

### III. CONCLUSION

The development of the Indonesian Constitution in the last 65 years, from 1945 – 2010, has been strongly influenced by debates on the relationship between the state and Islam. The last constitutional amendments of 1999 – 2002 are highly coloured by the same debates. The four constitutional amendments lacked what has widely been accepted as key features of a democratic constitution-making process. This problem with the reform process, however, related to fundamental issues within the Constitution itself. It contained two aspects seen as crucial to the identity and survival of the country by most nationalists, including the military: the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble to the Constitution. Many nationalists feared that opening the Constitution to real change would jeopardize these positions, which they saw, and still see, as non-negotiable.

Chapter XI, Article 29 of the 1945 Constitution, on Religion, was the only chapter which was not altered by the 1999-2002 constitutional reforms. The rejection of the proposal to insert the 'seven words' of the Jakarta Charter into Article 29(1) was more evidence that the debates on nationalism and Islamic state are sensitive and crucial issues in Indonesian constitutional history. The 1999-2002 constitutional debates on the insertion of the Jakarta Charter, in fact, repeated the same debates which had taken place in 1945 and 1956-1959.

Notwithstanding the agreement to keep the preamble, the Islamic factions kept fighting for the insertion of the 'seven words' of the Jakarta Charter into Article 29 of the Constitution, that is, for an expanded application of *syariah*. This was understood by the nationalist groups as an initial step towards establishing an Islamic state, something that the nationalist groups (including the military) saw, and still see, as non-negotiable. In the end, the insertion of the 'seven words' of the Jakarta Charter was rejected, just as it was during the constitutional debates of 1945 and 1956-1959.

The possibility that both the preamble (*Pancasila*) and Article 29 should be entrenched in their current forms to try to resolve the difficult relationship between Islam and state should therefore be given careful consideration. This would mean that the preamble and Article 29 should explicitly be identified as non-amendable provisions. This kind of provision is legitimate from a constitutional law perspective.

The 1999-2002 constitutional reform in Indonesia lacked several key features of a democratic constitution-making process: the amendment schedule constantly changed; there was no clear plan or objective; short-term political interests contaminated the amendment proposals; the MPR failed to win the people's trust in its capacity as a constitution-making body; and public participation arranged by the MPR was limited and badly organized. However, after having decades of no debate on the amendment of the Constitution, flaws in the process were unavoidable. Despite the 1945 Constitution being understood as an authoritarian document, it was still considered to be the source of a guarantee of two fundamental elements of the Indonesian state: (i) the rejection of an Islamic state; and (ii) the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble of the Constitution.

Further, despite the often-chaotic amendment process, Indonesia has effectively produced a new Constitution. Evolutionary step-by-step amendment has at last ended the temporary character of Indonesia's previous constitutions. The amended 1945 Constitution is the first Indonesian Constitution which does not explicitly mention that it is a provisional Constitution. Additionally, at the end of the process, the four amendments have created a far more democratic Constitution. In particular, the amendments established a clearer separation of powers between the executive, legislature and judiciary; and far more impressive human rights protections.

Finally, from Indonesia's experience, beside observing the general characteristics of constitution-making process in transition, scholars should note how the symbolic value of the 1945 Constitution strongly overshadowed the way the constitutional reform took place. Despite a process that was different to democratic processes in other countries, Indonesia's slow, patchy and tentative process managed to lead the country to a more democratic Constitution and contribute significantly to Indonesia's transition from overt authoritarianism. As *The Asia Times* wrote after the ratification of the Fourth Amendment in 2002:

[t]he process may have been messy and circuitous, but Indonesia's adoption of constitutional amendments underline how, in the end, the ... country remains very much on the transitional, if bumpy, road to democracy (*The Asia Times*; 14 August 2002).

## REFERENCES

Blanc, Andrea Bonime, - 1987, *Spain's Transition to Democracy*, Boulder and London, Westview Press.



- Clarke, Ross, "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials", *Australian Journal of Asian Law*, Vol. 5:2. 2003.
- Ellis, Andrew, "The Indonesian Constitutional Transition: Conservatism or Fundamental Change", *Singapore Journal of International and Comparative Law*, Vol. 6. 2002.
- \_\_\_\_\_, 2002, "Constitutional Reform and the 2004 Election", *unpublished paper*.
- Ihonvbere, Julius "How to Make An Undemocratic Constitution: The Nigerian Example", *Third World Quarterly*, Vol. 21:2, 2000.
- Indrayana, Denny, 2005, Indonesian Constitutional Reform 1999 – 2002: An Evaluation of Constitution-Making in Transition, Ph.D. *Thesis of the University of Melbourne*.
- Kansil, C.S.T., 2001, Christine S.T. Kansil, and Engeline R. Palandeng, *Konstitusi-konstitusi Indonesia Tahun 1945 2000*.
- Kawamura, Koichi, 2000, "Toward a Modern Constitution: The Second Amendment of the 1945 Constitution", *Ajiken World Trends*, Vol. 63. 2000; National Democratic Institute, Indonesia's Road to Constitutional Reform: the 2000 People Consultative Assembly Annual Session.
- Lev, Daniel S., 1966, *The Transition to Guided Democracy: Indonesian Politics, 1957-1959*.
- Liddle, R. William, 2002, 'Indonesia's Democratic Transition: Playing by the Rules' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*.
- Manan, Bagir, 2002, *Teori dan Politik Konstitusi (Theory and Politics of Constitution)*.
- Nauton, Adnan Buyung, 1992, *The Aspiration for Constitutional Government in Indonesia: A Socio-legal Study of the Indonesian Konstituante 1956-1959*.
- Reid, Anthony, 1974, *The Indonesian National Revolution 1945-1950*.
- Susanti, Bivitri, "Constitution and Human Rights Provisions in Indonesia: An Unfinished Task in the Transitional Process", *Paper presented at the Conference on "Constitution and Human Rights in a Global Age: An Asia Pacific History*, Canberra, 30 November-3 December 2001.
- Tim Lindsey, 2002, "Indonesian Constitutional Reform: Muddling Towards Democracy", 6 *Singapore Journal of International and Comparative Law* 244.
- Yusuf, Slamet Effendy and Umar Basalim, 2000, *Reformasi Konstitusi Indonesia: Perubahan Pertama UUD 1945 (Indonesia's Constitutional Reform: The First Amendment of 1945 Constitution)*.
- Lindsey, Tim, Simon Butt, and Ross Clarke. "Review is not a Release", *The Australian*. 27 July 2004.
- Lubis, Todung Mulya , "The Urgency of Constitutional Reform", *Van Zorge Report's Homepage*, 2001. Van zorge Report, Singapore. 3 October 2003. <[http://www.van-zorgereport.com/report/popup/index.cfm?fa=ShowReport&pk\\_rpt\\_id=16&-CFID=315606&CFTOKEN=71680888](http://www.van-zorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=16&-CFID=315606&CFTOKEN=71680888)>.